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Supreme Court of the United States

OCTOBER TERM, 1941

No. 143-144

F. M. MADDIX, MALINDA MADDIX,
W. F. SAULSBERRY and
GEORGE A. SAULSBERRY, - - *Petitioners,*

vs.

E. L. SAULSBERRY, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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GRABER PRINTING COMPANY, ASHLAND, KENTUCKY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Summary of Matters Involved.

This case involves a decision of the Circuit Court of Appeals for the Sixth Circuit affecting the title to certain Kentucky land and minerals which is in conflict with the settled laws of Kentucky relating to real estate, and to review which petitioners pray a writ of certiorari.

The action was brought by respondent, E. L. Saulsberry, in the District Court for the Eastern District of Kentucky, against the petitioners. It was alleged

that petitioners were trespassing on and removing certain fire clay claimed by respondent. The case was submitted to the District Court on stipulations and motions by the parties for summary judgment. The District Court adjudged that respondent was the owner of an undivided five-sixths interest in the fire clay under the land in controversy, but further adjudged that a deed which he obtained to the remaining one-sixth interest after he had commenced the action in the District Court was champertous and void. Respondent appealed to the Circuit Court of Appeals for the Sixth Circuit from so much of the judgment as cancelled the deed mentioned, and the petitioners took a cross-appeal from the part of the judgment adjudging the respondent the owner of five-sixths interest in the minerals.

The original and cross-appeals were heard and argued together in the Circuit Court of Appeals, and decided by that court on February 4, 1942, adversely to petitioners on both the original and cross-appeals. Petitioners filed petition for rehearing on March 2nd, which petition for rehearing was overruled on March 11, 1942, and the judgment of the Circuit Court of Appeals became final on that date.

By agreement of the parties the cross-appeal was prosecuted, heard and decided in the Circuit Court of Appeals upon the record prepared on the original appeal. One opinion was handed down on both appeals. In preparing the transcript of record for this petition, the Clerk of the Circuit Court of Appeals has prepared the record and proceedings on the original and cross-appeals in separate transcripts, and references will be made to same in this petition as "record on original appeal" and "record on cross-appeal".

The facts are not in dispute and were agreed upon in the Circuit Court of Appeals. They are:

In 1908, E. L. Saulsberry, respondent, joined by A. D. Saulsberry and their wives, executed a deed to petitioner, F. M. Maddix, and his brothers E. T. and Wess Maddix, whereby respondent purported to convey to petitioner and his brothers two tracts of land, one containing 154 acres and known in this case as the "Huntsman Dower Tract" and the other containing 48 acres and known as the "West End Tract". (Rec. original appeal pp. 19-23). At the time this deed was made E. L. Saulsberry was the actual owner of the "West End Tract". (Rec. cross-appeal pp. 1, 2). He owned, however, only a fractional undivided interest in the "Huntsman Dower Tract" (Rec. original appeal pp. 28, 29). In this deed there was inserted a "reservation" purporting to reserve all the fire clay, which reservation has been construed by the Circuit Court of Appeals to have related to both the "West End Tract" and the "Huntsman Dower Tract". (Rec. original appeal pp. 42-45 and Rec. cross-appeal pp. 12-15).

Petitioners never questioned the fact that this reservation applied to the "West End Tract", but did contend that it had no application to the "Huntsman Dower Tract", and that, if it did apply to the "Huntsman Dower Tract", it could not operate to except or reserve all the minerals thereunder for the reason that respondent did not own all these minerals, but only owned a fractional interest in the same at the time the deed was made.

Respondent owned only a five-twelfts remainder interest in the "Huntsman Dower Tract", and his cograntor, A. D. Saulsberry, owned only a two-twelfths

interest, at the time they made the deed of 1908 to petitioner, F. M. Maddix, and petitioner's co-grantees. The co-grantees conveyed their interest to said petitioner and he immediately went into possession of the land, claiming it as his own, and has so remained in possession of the land since 1908. (Rec. original appeal, pp. 28, 29). In 1938, F. M. Maddix leased a portion of the minerals under the land to petitioner W. F. Saulsberry, who in turn leased to petitioner, Geo. A. Saulsberry, and mining operations in the fire clay were commenced. (Rec. original appeal, pp. 8-12). This suit was commenced to restrain those mining operations.

After he had commenced his action, respondent obtained a deed from Mary Huntsman Griffith, the widow of the original owner of the land, purporting to convey her life interest and a one-sixth interest she had inherited from a deceased son.

It is the contention of petitioners that, under the law of Kentucky, respondent and his co-grantor, being together the owners of only a seven-twelfths interest in the land, could not "reserve" or "except" more than a seven-twelfths interest in the minerals in said land by their deed of 1908; that, therefore, no severance of the other five-twelfths interest in the minerals was ever effected and that petitioner, F. M. Maddix, acquired title to this outstanding five-twelfths interest in the minerals, as well as the surface, by his adverse possession of 30 years.

And it is further the contention of petitioners that, under the law of Kentucky, the deed obtained by respondent from Mary Huntsman Griffith after he had commenced this action, and while the minerals were being operated by petitioners, was champertous and void.

The Circuit Court of Appeals, in conflict with the settled law of Kentucky, has held that:

1. Although respondent and his co-grantor owned only a seven-twelfths interest in the property when they made the deed of 1908 to petitioner, Maddix, the "reservation" of "all the fire clay" operated to sever all the fire clay in the land from the surface, and although petitioner Maddix obtained title to the outstanding interests in the surface by adverse possession, he did not obtain title to the outstanding interests in the minerals by reason of such alleged severance.

2. The deed of 1938, obtained by respondent after he had commenced his action and after "appellee's entry and removal of the minerals" was held not to be champertous.

Jurisdiction.

It was the duty of the Circuit Court of Appeals to decide the title to the land and minerals involved in accordance with the rules of law established by the decisions of the Court of Appeals of Kentucky and the Statutes of Kentucky. Erie R. Co. v. Tompkins, 304 U. S. 64. Failure so to do is a proper subject of review by this court on petition for writ of certiorari. Cities Service Oil Co. v. Dunlap, et al, 308 U. S. 208. It is, therefore, upon the ground that the lower court has declined to decide this case in accordance with the rules established by the decisions of the Court of Appeals of Kentucky, and the Statutes of Kentucky, that the jurisdiction of this court is invoked.

The Questions Presented.

This case presents the following questions:

1. Could the lower court decline to follow the rule

of law established in Kentucky by the decision of the Kentucky Court of Appeals in the case of Rowland, et al v. Lilly's Heirs, 190 Ky. 757, which decision was that a person who owns only a fractional interest in land can not "reserve" or "except" all the minerals in the land, but can only except such interest in the minerals as he actually owns?

2. Could the lower court decline to follow the rule established by the decision of the Court of Appeals of Kentucky in the cases of Big Sandy Co. v. Ramey, 162 Ky. 236, and J. B. Gathright Land Co. v. Begley, 200 Ky. 808, which cases held that where there has been an ineffectual attempt to sever minerals from surface, or where only a part of the minerals have been severed from the surface, adverse possession of the surface extends to the unsevered minerals and ripens into good title to both surface and minerals?

3. Could the lower court decline to follow Kentucky Statutes, Section 210, providing that sales of lands in the adverse possession of another are void as particularly construed by the Court of Appeals of Kentucky in Big Sandy Co. v. Ramey, supra?

4. Has the lower court declined to follow the decision of this court in Orton v. Smith, 18 Howard 263, which opinion held, as a matter of common law, and independent of any champerty statute, that the purchase by a litigant of real estate, while a suit involving the title to it is pending, is litigious and void?

Reasons for Allowing the Writ.

The Court of Appeals of Kentucky has specifically decided the law involved in all of the first three questions presented. The law involved in the first question

has been fully and clearly decided in the case of Rowland v. Lilly's Heirs, 190 Ky. 757. In that case Mrs. Lilly and James West were the joint owners of two tracts of land. Mrs. Lilly conveyed her undivided one-half interest in the land to West, but, in the deed, inserted a reservation or exception by which it was purported to reserve all the minerals. West conveyed the lands to Williams and others with the same reservation in favor of Mrs. Lilly inserted in the deed. In an action between the heirs of Mrs. Lilly and the vendees of Williams, it was held by the Kentucky Court that since Mrs. Lilly never owned more than an undivided one-half interest in the land, she was powerless to reserve or except more than an undivided one-half interest in the minerals, and that the vendees of Williams were the owners of the one-half interest originally owned by West in the minerals. The decision in that case clearly applies to the case at bar. It is the law of Kentucky, and the lower court failed to follow this law of Kentucky when it held that the reservation in the deed of 1908 from respondent and his co-grantor, who together, owned only a seven-twelfths interest in the land in question, operated to except and sever all the minerals in the land.

The law involved in the second question presented has also been clearly settled by the decisions of the Kentucky Court. Where, as here, there has been an ineffectual attempt to reserve or sever minerals from the surface, or where only a part of the minerals have been reserved or severed, adverse possession of the surface extends to the part of the minerals which have not been severed and ripens into good title to both surface and unsevered minerals. This rule was clearly established in the cases of J. B. Gathright Land Co. v. Begley, 200 Ky. 808, and Big Sandy Co. v. Ramey, 162 Ky. 236.

In the former case an ineffectual attempt of a married woman to convey her minerals and reserve the surface of her land was held not to sever the minerals from the surface. In the latter case it was held that where only a portion of the minerals had been severed from the surface, adverse possession of the surface of land extended to that portion of the minerals which had not been severed and would ripen into good title to both surface and minerals.

The law involved in the third question presented is plainly fixed by Section 210, Ky. Statutes, which provides that any sale of land in the adverse possession of another is void. And it was held in Big Sandy Co. v. Ramey, supra, that a person in possession of the surface of land from which a part of the minerals have not been severed, is likewise in adverse possession of the unsevered portion of the minerals, and that a conveyance of that unsevered portion of the minerals, during such adverse possession, is void.

As to the fourth question presented, it is agreed that this action was brought by respondent to restrain petitioners from mining the minerals in question, and that after the action was brought, and while it was pending, respondent obtained a deed from Mary Huntsman Griffith purporting to convey to him her interest in the land which was in dispute. This was clearly a purchase of a litigious claim by a litigant while his suit was pending, and was therefore champertous and void according to the decision of this court in Orton v. Smith, 18 Howard 263. There is no Kentucky decision opposed to this rule.

BRIEF.

The lower court, in its opinion, recognized that respondent and his co-grantor together owned only

a seven-twelfths interest in the "Huntsman Dower Tract" at the time of their conveyance to petitioner, Maddix. But it holds that, nevertheless, a severance of all the minerals was effected by the "reservation" contained in the deed. The court further recognized that Maddix, by his adverse possession of the land for 30 years, obtained title to the outstanding interests in the surface, but held that, by reason of the supposed severance, he did not obtain title to the corresponding outstanding interests in the minerals. (Rec., original appeal, 40, 41, 42).

Hence, the decisive question, sharply presented, is: Under Kentucky law, did the "reservation" in the deed operate to effect a complete severance of all the minerals? If it did, then the lower court was correct in its ultimate decision on this point. If it did not, then according to the lower court itself, petitioner Maddix obtained title by adverse possession to the outstanding interests in the minerals as well as the surface.

The clear answer is supplied by the decision of the Kentucky Court of Appeals in Rowland, et al. v. Lilly's Heirs, 190 Ky. 757. The essential facts of that case have heretofore been recited. In reaching its decision that the owner of a fractional interest in land can not effect a complete severance of all the minerals, the Kentucky Court said:

> "Being an exception, it necessarily follows from the very nature of things that this grantor could not except out of the operation of her conveyance an interest to which she had no title."

In Kentucky, a grantee in an executed deed, as distinguished from an executory contract of sale, in holding land under claim of ownership, holds adversely as

to his grantor as well as to the world. Winlock v. Hardy, 14 Ky. (4 Littel) 272.

And, under the rule laid down in Big Sandy Co. v. Ramey, 162 Ky. 236, adverse possession of the surface of land from which part of the minerals have been severed, extends to all unsevered minerals.

Therefore, when the rules of Rowland v. Lilly's Heirs, Winlock v. Hardy, and Big Sandy Co. v. Ramey are followed and given their proper effect, it is clear that petitioner Maddix obtained title by adverse possession to the outstanding interests in the minerals in, as well as the surface of, the land in controversy.

And it is apparent from the face of the opinion of the lower court that its decision on this point is erroneous for the sole reason that the court failed to follow and apply these rules of law established by the cited decisions of the Kentucky Court of Appeals.

It necessarily follows from the foregoing that any and all attempted transfers of the land or any interests therein, after Maddix went into possession, in 1908, were champertous and void, for Maddix's possession was adverse both as to surface and minerals. Kentucky Statutes, Sec. 210. And, in fact, nothing could have passed by the deed of 1938 from Mary Huntsman Griffith to respondent for the reason that Maddix had already acquired title by adverse possession to all the outstanding interests in both surface and minerals. Kentucky Statutes, Section 2505.

But even upon other considerations, independent of the foregoing, the deed of 1938 which respondent secured after commencing his action, was void. The

lower court admits in its opinion that even if Maddix's possession of the surface of the land did not extend to the minerals prior to 1938, on the other hand, petitioner's entry into the minerals and removal of same in 1938 did amount to actual and adverse possession. But the court said that it was not adverse possession for the purposes of the Champerty Statute for the reason "that appellee (petitioner) was her (Mary Huntsman's) co-tenant in the minerals". (Rec. original appeal, p. 46; cross-appeal, p. 16). We have never been able to understand that statement. The court had just finished holding that Maddix had no interest whatever in the minerals. And, moreover, the court had also held that petitioner, instead of "holding the surface as trustee for her (Mary Huntsman) "had in fact been holding the surface adversely to her for 30 years and thereby obtained title to Mary Huntsman's interest in the surface. (Rec., original appeal, p. 42; cross-appeal, p. 12).

There is no law in Kentucky, or any other jurisdiction, that prevents a co-tenant from adversely possessing the whole estate. Greenhill v. Biggs, 85 Ky. 155. Nor is there any law which prevents a surface owner from acquiring adverse possession of minerals. Harkins v. Keith, 267 Ky. 353. Under the relationships noted, it is only necessary that the adverse nature of the possession be unequivocally brought to the attention of the other co-tenant or mineral owner, and this may require different acts from which would ordinarily be required where no trust relationship exists. But certainly it is not prohibited by law.

The petitioners were in adverse possession of these minerals when they commenced mining them under the claim that they owned them. Respondent's bill of com-

plaint had this for its very basis. And the deed of 1938, obtained by respondent after the bill of complaint was filed, was clearly champertous and void as held by the District Court. Ky. Statutes, Section 210.

The deed was also champertous and void because obtained by respondent while the suit was pending. The purchase of a litigious claim is champertous under the common law. And irrespective of any local rule, (although there is no rule in Kentucky to the contrary), this court is free to follow its own decisions on a matter of this nature. It peculiarly offects litigation in the Federal Courts. This court held in Orton v. Smith, 18 Howard 263, that the purchase of a title to land while a suit concerning it is pending will not be upheld or protected. This is in accord with the general law. Am. Jur., Champerty and Maintenance, Sec. 24.

But however this may be, as heretofore pointed out, it is seen that the deed of 1938 passed no title when the Kentucky law is followed on the first proposition argued. Petitioner, Maddix, had already obtained title by adverse possession to the outstanding interests in the minerals as well as the surface.

We submit it to be demonstrated beyond doubt, from the face of the opinion of the lower court, that it has declined to follow the law of Kentucky in deciding this case. Not only a statutory but also a constitutional right has thereby been denied petitioners. Erie R. Co. v. Tompkins, supra.

The law governing the title to minerals in Kentucky is important to residents of Kentucky and others who deal in those minerals. A large per cent of the wealth of Eastern Kentucky lies under the surface of its soil

in the form of fire clay, coal, oil, gas, etc. Much litigation arises constantly over this mineral wealth. It is therefore highly important that no erroneous precedent affecting these rights be left standing. The precedent established by the decision of the lower court in this case is so squarely opposed to the law of Kentucky on such vital and far reaching points that it will produce unestimable confusion in Kentucky mineral titles if not reversed, for the reason that the questions decided will recur again and again.

We therefore earnestly submit that the writ of certiorari prayed should be granted and the judgment of the lower court reversed.

Respectfully submitted,

H. R. WILHOIT,

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Counsel for Petitioners.

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BRIEF FOR RESPONDENT.

DYSARD & DYSARD,
H. R. DYSARD,
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BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

On May 15, 1908, E. L. Saulsberry conveyed to F. M. Maddix, E. T. and Wess Maddix, of Carter County, Kentucky, a boundary of land with certain exclusions, described in the deed from E. L. Saulsberry, et al., to the Maddixes (p. 2, agreed statement of facts). By this deed E. L. Saulsberry conveyed the surface with certain exceptions, to-wit: clay and minerals, to the Maddixes, who had lived by and on the property from childhood. The Maddixes paid $1,000.00 cash in hand and executed four notes, the last note being due January 1, 1910, more than eighteen months after the execution of the deed. The Maddixes, who had lived by and on this land all their lives, accepted without question the title of E. L. Saulsberry and paid for it without question, and took charge of the surface. E. L. Saulsberry reserved the fire clay and other minerals under the land; the reservation being found on page 5, and reads as follows:

"There is reserved, however, and not herein con-

veyed all of the fire clay and other minerals on the foregoing described land lying below the level of the top of the rock cliff on the line of said land at falls of Smith Branch together with the right to remove said minerals from said land and to enter thereon for the purpose of making surveys thereof."

Maddix took charge of the surface and as he says cleared it up, exercised control of it under this deed from May, 1908, for more than thirty years. The surface having been separated from the mineral, Saulsberry paid his taxes on the minerals, claimed them, all the while both parties satisfied with their bargain.

On May 2, 1938, thirty years after he had purchased from E. L. Saulsberry, and recognizing all the while that Saulsberry had reserved the fire clay under the land purchased by Maddix from Saulsberry, Maddix undertook to enlarge the boundary conveyed to him by E. L. Saulsberry, and made a deed to W. F. Saulsberry for what he alleged to be four acres of land which he claimed he owned by possession, and which he claimed was outside the boundary that E. L. Saulsberry had conveyed to him (Maddix). This deed is found on page 8 of the record. When it came to the attention of E. L. Saulsberry that Maddix was trying to pinch off four acres of the boundary of clay which he had reserved, and on November 4, 1938, E. L. Saulsberry brought this suit in the United States District Court for the Eastern District of Kentucky to stop them from making this claim. Then for the first time Maddix set up claim that E. L. Saulsberry did not own what he, E. L. Saulsberry, had conveyed to Maddix in 1908, and they alleged all kinds of defenses to the action; and although E. L. Saulsberry and his father before him,

his father having been dead for more than forty years, claimed this land and had a title for it, which Maddix was willing to buy and pay money for, in 1908, now, in 1938, thirty years later, Saulsberry finds his title questioned, although he and his father had been in possession of it for more than fifty years; and Maddix seeks to combine the surface possession with the separated mineral estate reserved by Saulsberry, and in that way claim by possession the mineral estate which E. L. Saulsberry specifically reserved. This, of course, the Kentucky Statutes and courts say cannot be done.

In Baldwin's Kentucky Statutes, 1936 Edition, section 2366a-1, it is provided that the surface owner holds the mineral if the surface and mineral are separated, for the benefit of the owner of the mineral, and adverse possession does not run against the owner of the mineral.

In addition to this Statute, the Kentucky Court of Appeals has held that where the surface estate and mineral estate have been severed, possession of the surface is not possession of the mineral in an adverse sense, but that the surface owner holds possession of the minerals for the benefit of the true owner of the minerals, and that no difference how long the surface owner is in possession of the surface, he cannot claim adverse possession against the mineral holder without specific notice to the mineral holder that he is so doing, and acts of ownership on the part o fthe surface owner plainly indicating his claim of the minerals.

Asher v. Gibson,
198 Ky. 285, 248 S. W. 862.

Smith v. Graf,
259 Ky. 456, 82 S. W. (2d) 461.

Stoffler, et al. v. Edgewater Coal Company,
198 Ky. 523, 249 S. W. 753.

Oil & Gas Company v. Mullins,
269 Ky. 514, 106 S. W. (2d) 979.

There is no contention that there ever was a visible possession of the minerals here by Maddix, or that he ever gave respondent any notice that he (Maddix) was claiming the minerals, and it is the universal holding that there must be a visible possession and notice to the world of the claim, for it to ripen into title by adverse possession. In this case there is an entire absence of any evidence of any claim by Maddix to the mineral under the land conveyed to him by Saulsberry.

Reference to the affidavit of Maddix, filed herein (pp. 29, 33), shows Saulsberry claiming the land he sold to Maddix and on that Maddix swears:

> "At all times before the deed was made (that is, the deed from Saulsberry to Maddix) (deed made in 1908) I was given to understand through representation made by A. D. (meaning A. D. Saulsberry) that he and E. L. (meaning E. L. Saulsberry) owned all the interest in the dower tract except the interest owned by H. M. Saulsberry."

Here is a man swearing that his grantors were reserving 13.8 acres of the land for H. M. Saulsberry, but a reference to the deed made by E. L. Saulsberry to Maddix (p. 5) shows that that is an error, because, on page 5, under the warranty in that deed, we find this language:

> ". . . but the said A. D. Saulsberry warrants the title hereto against any claim or demand of H. M. Saulsberry."

and A. D. Saulsberry was conveying to the Maddixes the interest that H. M. Saulsberry had conveyed to him.

Maddix admits the 13.8 acre reservation, and admits the 38 acre reservation in this affidavit (p. 31) and accepted the deed without question for thirty years, which deed reserved the clay, and the clay becoming valuable thirty years after he bought the surface caused him to change his mind, as so many men do when they imagine they see an opportunity to enrich themselves by the mere effort of swearing. Mr. E. L. Saulsberry had claimed this land for more than forty years, but finding himself surrounded by these gentlemen so willing to claim, and being uneasy lest he be given trouble on his warranty to Maddix, went to Mary Huntsman Griffith and got a deed from her (R., pp. 26, 27). This was done to make a perfect paper title to the surface conveyed to Maddix thirty years before; but E. L. Saulsberry is not confined to the Griffith deed for title to this land, because here we have Maddix's testimony in affidavit form that Saulsberry was claiming it when he conveyed it to him in 1908, and Saulsberry swears in that portion of his affidavit copied (pp. 33, 34), that he reserved the fire clay in the deed to Maddix in May, 1908, the reservation being heretofore quoted; and at page 34 he says that his ownership of the clay and other minerals under said dower tract had never been questioned until in 1938. All the records, all the facts, all the circumstances, and the affidavit of Saulsberry show that he owned the surface and the minerals in 1908; that he divided the property, conveyed the surface to Maddix and reserved the mineral estate to himself. There is no evidence in this record except the now bald statement of Maddix that he thought he owned it all; no writing ever served on E. L. Saulsberry that he (Maddix) was claiming the mineral; no evidence in affidavit form or otherwise that he (Maddix) ever told E. L. Saulsberry he (Maddix)

was claiming the mineral; and his very acknowledgment when he conveys the four-acre boundary which he alleged to be outside of the boundary conveyed to him by E. L. Saulsberry, contradicts his statement that he thought he owned all the clay. If he thought he owned all the clay under the boundary conveyed to him by E. L. Saulsberry, why did he convey to W. F. Saulsberry those four acres that he claimed was outside of it? The statement of Emerson comes here with great force: "I cannot hear what you say because I am looking at what you do."

Realizing that there was no merit in the claim for the clay under the land conveyed to Maddix by Saulsberry, counsel seek to say that the reservation applied only to the 48-acre tract of land owned by Saulsberry, notwithstanding the fact that the language of the deed says, in a separate paragraph:

> "There is reserved, however, and not herein conveyed all the fire clay and other minerals on the foregoing described land."

The whole boundary was described, and in the warranty they use the words "foregoing real estate including all the estate conveyed", and not alone the 48 acres. They use the same word "foregoing" to warrant the land and to reserve the clay. We will not trespass upon the Court's time to argue this. It simply speaks for itself.

The only parties claiming the land involved in this suit were E. L. Saulsberry and F. M. Maddix. Mary Huntsman Griffith was making no claim whatever. Only title to the four acres was involved. That being so, we think the Court properly adjudged E. L. Saulsberry to be the owner of the dower tract. Between

Maddix and Saulsberry, we think unquestionably the record shows it belonged to E. L. Saulsberry. It must not be overlooked that Maddix bought the surface of this land from E. L. Saulsberry, and having taken possession of the surface under a deed from E. L. Saulsberry, it must be presumed that his holding of the clay which was reserved by E. L. Saulsberry was friendly to E. L. Saulsberry's title, and for the benefit of E. L. Saulsberry, until notice that Maddix was claiming the clay had been brought home to E. L. Saulsberry. There is no such notice in the record.

The Kentucky Court of Appeals, in the case of Turk v. Wilson's Heirs, 266 Ky. 78, 98 S. W. (2d) 4, the part quoted being found on page 11, said:

> "An element of possession, which is necessary to cause it to ripen into a title, is that it must be visible and notorious. The true owner must have knowledge of the hostile claim, or the possession must be so visible and notorious as to raise the presumption of notice to everyone that the right of the owner is invaded intentionally with a purpose to assert a title adverse to his. For one to simply make claim by his thoughts to a body of land . . . would not give notice to the owner nor anyone else of the claimant's intentions."

This has been quoted with approval so many times in Kentucky that we will not trespass upon the Court's time by citing the multitudinous cases so holding.

In the case of Culton v. Simpson, 96 S. W. (2d) 856, the court said:

> "An adverse possession cannot be established by paying taxes upon the coveted property."

In the case of Stearns Coal & Lumber Company, et

al. v. Boyott, et al., 168 Ky. 11, 181 S. W. 962, the court announced further:

> "For one to simply make claim by his thoughts to a boundary of land, . . . would not give notice to the owner nor anyone else of the claimant's intention."

and to set this doctrine at rest in Kentucky for all time, the court, in the case of Flinn v. Blakeman, 71 S. W. (2d) 961, 254 Ky. 416, decided in 1934, set out the requirements to obtain title by adverse possession. These requirements are: actual, exclusive, open, notorious, continuous, hostile, or adverse possession for fifteen years in a visible form with your flag flying all the time. At the expense of repeating, may we say Maddix accepted E. L. Saulsberry's deed to the surface. He swore as above quoted that Saulsberry claimed to own it all in 1908. E. L. Saulsberry claims his title was never questioned until the effort to nick off four acres in the deal between F. M. Maddix and W. F. Saulsberry in 1938.

CHAMPERTY.

To avoid just what we have here, and to prevent those who own the surface deciding after a while that they own also the minerals below the surface, the Kentucky Legislature, in 1906, enacted Section 2366a-1, Carroll's Kentucky Statutes, which reads as follows:

> "Wherever the mineral or other interests in or rights appurtenant to and in this Commonwealth have heretofore passed, or shall hereafter be passed, in any way from a claimant in possession of the surface of said land, the continuity of the possession of such mineral interest and rights shall not be deemed thereby to have been, or to be, broken; but the possession of the surface by the original claimant thereof, from whom such min-

eral, interests, or rights passed, or of those claiming through or under him, by virtue of a judgment against him in an action to which the holder of said mineral, interest, or rights is not a party, shall be deemed to have been, and hereafter to be, the possession of such mineral, interests and rights in said land for the benefit of said person, his heirs and assigns to whom said mineral interests or rights have or shall have passed as aforesaid."

It is our contention that when E. L. Saulsberry conveyed this 154 acre tract less the exclusions of 38 acres and 13.8 acres, that he reserved the minerals under this tract including the fire clay. (Agreed statement, p. 5). The language of the reservation reads as follows:

"There is reserved, however, and not herein conveyed, all of the fire clay and other minerals on the foregoing described land lying below the level of the top of the rock cliff on the line of said land at Falls of Smith Branch together with the right to remove said minerals from said land and enter thereon for the purpose of making surveys of same."

According to all the rules of construction we know this does not convey the clay to the grantees in that deed, but reserves the same for the grantor.

Petitioner makes the contention that the deed from Mary Huntsman Griffith to E. L. Saulsberry was void and that Saulsberry was not the owner of one-sixth of the 104 acres which was originally 154 acres known as the Huntsman dower tract.

It is the contention of the respondent that as to him Section 210 of the Kentucky Statutes, known as the Champerty Statute, does not apply, because petitioner was holding for respondent's benefit under Section

2366-a of the statute above quoted. The Kentucky Champerty Statute, Section 210, reads as follows:

> "All sales or conveyances, including those made under execution, of any lands, or the pretended right or title to the same, of which any other person at the time of such sale, contract or conveyance, has adverse possession, shall be null and void."

We call the Court's attention to the fact that for a deed to a grantee to be champertous, there must be some third party in the adverse possession of the land or mineral conveyed.

It is our contention that, having reserved and not having conveyed the mineral to Maddix at the time we conveyed the surface, that that act separated the mineral estate and the surface estate, and that from that time on, Maddix held possession of the surface estate for the benefit of E. L. Saulsberry, the owner of the mineral below the surface, under the statute above quoted.

In the deed from E. L. Saulsberry, et al., to the Maddixes, this 154 acres of land is described as having been conveyed by deed from P. F. (A. F.) Maddix and wife to William Saulsberry, dated July 1, 1892, and recorded in Deed Book "O", page 186, Carter County Record of Deeds. Also other deeds in Statement of Facts at pages 21-22; also same pages in record here.

Here is a deed from the father of F. M. Maddix, the petitioner herein, to the father of E. L. Saulsberry, the respondent herein; and under the law, the petitioner must take note of the deeds in his chain of title, and he is presumed to have knowledge thereof.

Blackburn v. Piney Oil & Gas Co.,
278 Ky. 191, 128 S. W. (2d) 192.

Cox v. Colossal Cavern Co.,
210 Ky. 612, 276 S. W. 540.

This no doubt is the basis for the representation made by E. L. Saulsberry and his brother, A. D. Saulsberry, to the Maddixes when they sold the land to them, that they owned it all.

The court will note, in the affidavit of F. M. Maddix (Agreed Statement of Facts, p. 30), this language:

> "At all times before the deed was made, I was given to understand, through representations made by A. D. that he and E. L. owned all the interest in the dower tract except the interest owned by H. M. Saulsberry and when the deed was made, A. D. and E. L. said and represented to me and my brothers that they were reserving the 13.8 acres marked on the map of Mr. Gesling for H. M. Saulsberry."

The Court will note here that Mr. Maddix was fully aware that the 13.8 acres was being reserved.

In this same affidavit, at page 31, he also says that there was a 38-acre reservation. 38 acres plus 13.8 acres makes 51.8 acres which, taken from 154 acres, leaves 102.2 acres. This 38 acres was reserved for one of the heirs, which made that heir obtain something over 13 acres more than the heir was entitled to. The heir to whom that 38 acres was set off, as we understand, was the mother of the present petitioner, F. M. Maddix.

Here we have the affidavit of the petitioner that Saulsberry was claiming this in 1908 when he made this deed and here is the deed from Maddix's father to Saulsberry's father, dated in 1892, for this identical

tract of land; and here is the affidavit of Saulsberry that his title was never questioned until 1938.

In the case of Warfield Natural Gas Company v. Ward, 286 Ky. 73, 149 S. W. (2d) 705, the Kentucky Court of Appeals held, in March, 1941, that one tenant in common who owned 2/8 undivided interest in the oil and gas could not hold adversely to the other tenant in common who owned 6/8 because of Statute 2366a-1 hereinbefore copied, without giving notice of his claim; and the character of claim necessary for a surface owner to claim the mineral underneath is set out in McPherson v. Thompson, 261 S. W. 853, 203 Ky. 35, reading as follows:

> "In order to acquire title by adverse possession of minerals in place which have been separated from the surface, the possession must be open, notorious, continuous, and uninterrupted as well as actual and adverse. The owner of the surface is regarded as trustee, in possession of the mineral for the use and benefit of its real owner, and he cannot acquire title by adverse possession to the mineral estate except in the way and manner which a trustee of other real property may acquire title against the cestui que trust. He is subject to all the rules controlling other trustees in possession. He must not only enter into the actual possession of the minerals by opening and working the mines, but the actual possession must be continuous, uninterrupted, open and notorious for the statutory period. The mere opening of a coal mine by the surface owner and the taking of coal occasionally for domestic purposes or for sale in the neighborhood does not start the statutes running; nor will the opening and operating of such mines at intermittingly short periods, but not continuously for the statutory period, ripen title to the mineral estate in the holder of the surface."

In the case of Kentucky River Coal Corporation v. Singleton, 36 Federal Supplement, 123, the Court, speaking of Section 2366a-1 of the Kentucky Statutes, said:

> "Under this statute, the Kentucky authorities are unanimous in holding that after severance of the mineral title one who acquires possession of the surface from the same grantor is deemed to hold possession of the minerals as trustee for the mineral title and, in the absence of an explicit disclaimer and clear repudiation of this subsisting relationship in a manner sufficiently open and notorious to bring home to the mineral owner knowledge or notice of the hostility of the surface holder's possession, the surface holder, being a trustee in possession, can never acquire the title of his cestui que trust by any length of possession for his possession never becomes adverse. The possession of the mineral owner being thus preserved and protected by the statute is not lost nor its continuity interrupted by any length of non-user. Farnsworth v. Barret, 146 Ky. 556, 142 S. W. 1049; Scott v. Laws, 185 Ky. 440, 215 S. W. 81, 13 A. L. R. 369; McPherson v. Thompson, 203 Ky. 35, 38, 261 S. W. 853; Franklin Lluorspar Co. v. Hosick, 239 Ky. 454, 39 S. W. (2d) 665; Piney Oil & —Gas Co. v. Scott, 258 Ky. 51, 79 S. W. (2d) 394; Harkins v. Keith, 267 Ky. 353, 102 S. W. 5; and Curtis-Jordan Oil & Gas Co. v. Mullins, 269 Ky. 514, 106 S. W. (2d) 979."

In the case of Curtis-Jordan Oil & Gas Co. v. Mullins, 106 S. W. (2d) 979, 269 Ky. 514, the court said:

> "In Piney Oil & Gas Company v. Scott, supra, it was held in effect that after a deed to minerals underlying certain lands had been recorded, the grantor who retained the surface and persons claiming under him became trustees for the grantee of the minerals and they could not by posses-

sion of the surface disseise the grantee of the minerals unless they openly disavowed or repudiated the trust and gave the owner of the mineral estate notice thereof; and it was further held in that case that adverse possession of minerals means adverse occupancy and user which must be wrought on the property in question. The owner of the surface may acquire title by adverse possession of minerals separated from the surface, but to do so he must not only open and work the mine, but actual possession and work must be uninterrupted, continuous, open, and notorious for the statutory period. McPherson v. Thompson, supra."

There is no contention that Maddix ever sought to open up this mine or do anything to it until 1938. There is no contention that he ever gave Saulsberry any notice; and in his affidavit (R. p. 31) he says:

> "It was at least twenty years from the time of the deed of 1908 before I even saw E. L. Saulsberry again and I never had any discussion with him concerning the clay rights under this dower tract."

In the case of Crabtree v. Petroleum Exploration Company, Inc., 282 Ky. 32, 137 S. W. (2d) 713, it is said:

> "In Curtis - Jordan Oil & Gas Co. v. Mullins, supra, it was held that the title and ownership of the surface of the land did not carry title or possession of the mineral estate thereunder which had been sold and severed, but that the presumption would prevail that the owner of the surface was merely trustee of the mineral estate for the use and benefit of the owners thereof; that limitation does not run in favor of the owner or holder of the surface against the owner of the minerals merely because of ownership or possession of the surface for any length of time; that in order for such owner of the surface to acquire title by adverse

possession to severed minerals in the land, he must develop, open and work the mine continuously and uninterruptedly under claim of right for the statutory period or he must openly disavow or repudiate the trust and give the owner of the minerals notice thereof. (See also authorities cited in that opinion.) Although there is evidence that appellant has been in possession and claiming the lands in controversy for more than 15 years, such possession did not carry with it adverse possession to the mineral estate which had been separated from the surface. Furthermore appellant testified that he entered on the Curry tract under permission of Bruce Byrd and there is no showing how or when, if ever, the character of his occupancy or holding changed."

"Furthermore we are constrained to hold appellant had no title to the oil or gas in the land when he executed the lease. This lease was apparently taken by the Petroleum Exploration as a matter of precaution because of the claim appellant was making, but it did not render its claim to the oil and gas amicable to the interfering claim of appellant by taking a lease or conveyance as a means of quieting its title or preventing litigation. Bryant v. Prewitt, 132 Ky. 799, 117 S. W. 343; Anderson v. Proctor Coal Co., Ky., 128 S. W. 85."

We do not think, under this state of facts, that the champerty question applies to the deed of Mary Huntsman Griffith to E. L. Saulsberry because the possession of the minerals was not adverse to E. L. Saulsberry, but under the express provision of the Statute, was being held for him.

The Kentucky Court of Appeals, in the case of Lanham v. Huff, 228 Ky. 139, 14 S. W. (2d) 412, said:

"This court has established the rule, in an unbroken line of decisions, some of which are cited

below, that, inasmuch as the champerty statute is penal in its nature, the evidence to establish the facts authorizing its application should be clear and convincing, and, since there are so many elemental facts entering into the determination of the question, each case must be determined on its own facts. Some of the fundamental rules for the establishment of such facts are: That the adverse possession necessary to create the defense must be actual and not constructive, and that it must be open, notorious, visible, and of such a nature as, if continued long enough, would ripen into title. See Myers v. McMillan, 4 Dana, 485; Cardwell v. Sprigg's Heirs, 7 Dana 36, and again in 1 B Mon. 369; Mays v. Kenton, 64 S. W. 728, 23 Ky. Law Rep. 1052; Interstate Investment v. Bailey, 93 S. W. 578, 29 Ky. Law Rep. 468; Krauth v. Hahn, 139 Ky. 612, 65 S. W. 18; Brown v. White, 135 Ky. 452, 156 S. W. 96; LeMoyne v. Litton, 159 Ky. 652, 167 S. W. 912; and Kentucky Union Co. v. Hevner, 210 Ky. 121, 275 S. W. 513."

RULE OF CONSTRUCTION.

It is a rule of all courts to construe every written instrument so as to ascertain the intention of the parties.

Hall v. Meade,
51 S. W. (2d) 974, 244 Ky. 718.
Malloy v. Barkley,
219 Ky. 671, 294 S. W. 168.
Fairchild v. Fairchild,
237 Ky. 700, 36 S. W. (2d) 237.

YOU CAN RESERVE ANY PART OF ESTATE BEING CONVEYED.

In the case of Cox v. Colossal Cavern Co., 276 S. W. 540, 210 Ky. 612, the court approves the doctrine that an owner may convey land and reserve the caves.

In the case of Ball v. Clark, 150 Ky. 383, 150 S. W. 359, the Kentucky Court of Appeals said:

"The owner of land may convey the surface to one and reserve to himself an estate in fee in the minerals, or vice versa, or may convey the surface to one and the minerals to another; the effect of such a conveyance will be to create an estate separate and distinct in the sundered properties the one from the other, entire and complete in fee simple."

In the case of Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, the court said:

"Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are land owners. They own separate and distinct corporeal hereditaments . . . . Each estate is as distinct property in the respective owners as is the property in a two-story house, where the title to the lower story is in one person and the title to the upper story is in another. An action of ejectment will lie in behalf of the owner of the surface to recover it. Also an action will lie in behalf of the owner of the mineral estate to recover it."

YOU CAN BUY YOUR PEACE IF YOU CARE TO DO SO.

The Kentucky Court of Appeals in the case of Warfield Natural Gas Company v. Ward, 286 Ky. 73, 149 S. W. (2d) 705, said:

"You can buy your peace without forfeiting what you have in the way of title."

Cavin v. Little,
281 S. W. 480, 213 Ky. 482.
Haldeman v. Haldeman, 98 S. W. 277.

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